IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.M.JAMES

THURSDAY, THE 15TH MARCH 2007 / 24TH PHALGUNA 1928

CRL.A.No. 1238 of 2002()

SC.606/1999 of ADDL.SESSIONS COURT (ADHOC), KASARAGOD

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APPELLANT: ACCUSED:

E.RAGHAVAN, S/O.KUNHIRAMAN,
KUNNAMKAL, PILIKODE VILLAGE.

BY ADV. SRI.DILIP MOHAN
SMT.T.SUDHAMANI

RESPONDENTS: COMPLAINANT & STATE:

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1. THE SI OF POLICE,
NILWSHAR POLICE STATION.

2. THE STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERLA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.THOMAS JOHN AMBOOKEN.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 15/03/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.M. JAMES, J.

Criminal Appeal No. 1238 of 2002

Dated this the 15th March, 2007.

J U D G M E N T

The accused in S.C.No.606/1999, on the file of the Additional Sessions Court, (Ad hoc-I), Kasargod, is the appellant. He was found guilty of the offence punishable under Section 55(a) of the Abkari Act, in short 'the Act', and, therefore, was convicted and sentenced thereunder to undergo rigorous imprisonment for a period of three years, and also to pay a fine of Rupees One Lakh, in default, to undergo rigorous imprisonment for one year.

2. The prosecution case in brief is that while PW.1, the Sub Inspector of Police, Nileshwar, was on duty along with PW.2, the police constable, near the Nileshwar Railway Station, the appellant was found carrying 130 packets of Karnataka arrack, kept in M.O.3 airbag. He was intercepted and the contraband was seized. Each packet contained 100 ml. of arrack. Therefore, eight packets were taken for sampling. M.O.1 series contained 122 packets of Karnataka arrack of 100 ml. capacity. Ext.P6 is the chemical analysis report which show

that the specimen contained Ethyl Alcohol of 34.90 percentage by volume. PW.5 who detected the case along with PW.2 also investigated the same, and filed the final report.

3. The prosecution examined 5 witnesses and marked 6 documents. Three material objects were also brought into evidence having identified through witnesses. The learned Additional Sessions Judge accepted the prosecution version, convicted and sentenced the accused, appellant, as stated above.

4. Counsel appearing for the appellant, accused, contented that PW.2 was not along with PW.5. Even according to PW.2, he was doing the guard duty in the Treasury at Nileshwar. Therefore, the counsel submitted that with the sole evidence of PW.5, the detecting officer, who investigated the case, the appellant, accused, may not be convicted. Counsel further submitted that of the 130 packets seized, only 8 packets were subjected to chemical

analysis, to certify that they were Ethyl Alcohol, and the remaining packets were not established. Counsel, hence, prayed that the appellant, accused, may be acquitted.

5. I have gone through the evidence of Pws.2 and 5. The specific case of the prosecution is that PW.5 took PW.2, who was on guard duty in the Treasury at Nileshwar. This has been challenged by the appellant. If I fully agree with the proposition put forward by the prosecution that PW.2 had been with PW.5, at the time of the detection and seizure, he ought to have been one of the attestors or the witnesses in Ext.P3 seizure mahazar, or in Ext.P2 scene mahazar prepared by PW.5. The independent witnesses who attested Ext.P2 scene mahazar, PW.3 as well as PW.4, who attested Ext.P3 seizure mahazar, had turned hostile. Although both of them admitted their signatures in Exts.P2 and P3, they deposed that Exts.P2 and P3 were prepared at a later time, and the police got the same signed, other than in the place of occurrence.

6. I may agree with the argument of the prosecution that PWs. 3 and 4, the independent witnesses, who knew the appellant, may have been won over by the appellant. But at least, the prosecution has to prove, beyond reasonable doubt, that PW.5 seized the same in the presence of others, and PW.2 was present at that time. As PW.2 admitted that he was on guard duty at the Treasury at Nileshwar, and PW.5 took him, at 5.45 a.m. in the morning to the railway station, the prosecution has to explain and establish the presence of PW.2 with PW.5. In the absence of the said proof, for the presence of PW.2, particularly, through Ext.P3 seizure mahazar, which is the best document to show the presence of PW.2, I doubt the version of prosecution, as put forward through PW.2. It would be improper on the part of the court to rely on the sole testimony of PW.5, who had detected the case, investigated the case, filed the final report, and prosecuted the matter, so as to convict the accused.

7. The punishment prescribed under Section 55(a) of the Abkari Act is severe, extending to a maximum of 10 years and a fine of Rupees One Lakhs, after the amendment of the provisions in

the year 1997. The earlier punishment prior to 3.6.1997 was two years and with a fine, which shall not be less than Rs.25,000/=. The amendment had been brought about to tackle the illegal activities of the unauthorised persons in possessing, transporting or doing any other acts, in violation of the provisions of the Abkari Act. The prosecution cannot take the evidence, as a matter of course, and on the other hand, it has to produce cogent and clinging evidence that in no circumstances, there can be another view possible. In the case at hand, the entire circumstances available clearly show that the evidence of PW.2 is doubtful, as his presence also cannot be accepted.

8. The conducting of chemical examination only on 8 packets, will not affect the whole case of the prosecution, as the appellant was found in illegal possession of the Karnataka arrack. There is transportation of arrack. But the prosecution has to prove that he was actually in physical possession of a particular quantity of Karnataka arrack, and they were seized and proved as per law. Therefore, I am not able to accept and act upon the evidence available on record.

9. In the above circumstances, I find that the prosecution has failed to establish a case under Section 55(a) of the Abkari Act against the appellant. Therefore, I set aside the conviction and sentence passed by the court below, in S.C.No.606/1999. The appellant, accused, is set at liberty, forthwith, cancelling his bail bond.

Criminal Appeal is allowed as above.

J.M. JAMES,
JUDGE

nj.

J.M. JAMES, J.

Criminal Appeal No. 1238 of 2002

J U D G M E N T

Dated: 15th March, 2007.